

CHAPTER 12

REMINISCENCES

I. INTRODUCTION

ARNOLD M. ZACK\*

Those of you who heard Dick Mittenthal deliver yet another wonderful analysis of our role and our work and our decisionmaking process might not have noticed the omission of what I think to be the most important standard in that process, and that is the daily examination of our horoscopes. For this very morning the horoscope for George Nicolau, an Aquarius, reads as follows: “Unless your counterpart in a joint venture possesses the expertise you lack, the endeavor will be mediocre at best and not achieve anything near what you are hoping to gain.” I’m a Libra. Mine reads: “You are usually very sensitive to the privacy of others—that’s not true—but today your curiosity could push your inquiry over the line. You may end up poking your nose into a matter that an acquaintance is anxious to keep quiet.”

No one has done as much in so many exciting fields as has George Nicolau, from his war service to his being a one-legged starring player in four professional sports. This is a good chance to learn about his work as an advocate, along with his work as a mediator, as a Peace Corps staffer, and how he got into arbitration. We will also chat about his leadership of the Academy’s young Turks in New York City, his airline and sports work, and his National Academy initiatives. But most important, I’d like to tap his insights as to how he views the practice and the future of labor arbitration, our role in the employment area, and, given the wonderful venue that he and Siobhan have carved out, the answer to the question, why are you still doing this stuff? First question—do you want to start off talking about the sling holding your arm or your leg?

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## II. COFFEE LOUNGE CHAT

GEORGE NICOLAU\*

**George Nicolau:** Back in another life, 45, 50 years ago, I represented the Actors' Equity Association in legitimate theater and I still have a number of Broadway friends. One of them who knew that I was going to be speaking at the fireside chat/coffee shop klatch today but also knew that I only had one leg called me and said, "Don't break a leg, break an arm."

**Arnold Zack:** A friend of mine said that if you have one leg you can't kick; if you have no legs you don't have a leg to stand on. Tell us why you gimp.

**George Nicolau:** I wasn't going to do that but a couple of folks asked me to. We are talking about World War II. I had volunteered for what was then the Army Air Corps as soon as I was 18 because, as you recall, that was a good war and I managed to talk the high school principal into being allowed to graduate in absentia. I became a B-17 navigator because I broke a tail wing on a Piper Cub and they decided my depth perception wasn't that good, but I had a great analytical mind. It's not really much of a war story. I was not a prisoner of war, as Arvid Anderson was.

People ask me if I got shot down like Arvid and I say, no, I just got shot up. I went on four missions. One of them was uneventful, as told in Reg Alleyne's account in *The Chronicle*, but the rest were unbelievably difficult. I just want to tell you about one. B-17s fly at 25,000 feet in formations of 54 airplanes put together in a way that their fire can deal with fighters and anti-aircraft fire. Patton was about to break out of St. Lo and we were going to be required to fly at 10,000 feet in formations of three, which is crazy. We were going to bomb airfields northwest of Paris. We had been told never to fly over Paris because it's probably the most dangerous place due to the anti-aircraft fire. Despite this warning, our lead pilot took us over Paris both going and coming, and at one point took us on a 180-degree turn where we dropped 2,000 feet with all the flak right in front of us. It was terrible. Then he took us over Le Havre, which we hadn't captured, rather than Cherbourg, which we had taken. We had maybe 200 holes in our airplane when we came back. Transmitters had been ripped off the wall of the radio room and

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we all confronted this pilot, who was a Chinese-American named Captain Chen. We told him that he took us over Paris and he said that he had not, that it was Rouen. I was 19, the youngest person on the crew, and I said, "Captain, I've never been to Paris but I know the Eiffel Tower when I see it and I saw it twice today."

The radio operator in our crew was a Japanese-American named Yukio Kishi. His parents were in one of our concentration camps. As a young person, that didn't really sink in with me until later. I lost track of Yukio and I saw Ted Tsukiyama in Hawaii and told him that I had a Japanese member in my crew and he told me that I didn't. I asked what he meant and he said there was only one Japanese-American flying in the Air Force and that was Ben Nakamura and he was a bombardier. I asked Ted to find Kishi, another Japanese-American in the Air Force. Within two weeks Ted had found him and I began a correspondence with him.

On my third mission, Ludwigshafen, the flak was terrible. On my fourth and last, I was just doing my job. As a navigator, my job, I thought, was to sit in the bombardier's seat where I could see better on the way to the target. I was sitting in that seat and I was hit by flak. I thought the end was near, but the bombardier saved my life. We never went to the first aid classes, but he knew how to put a tourniquet on my leg, and how to put morphine into my body. I got back and here I am. The co-pilot was killed later on but I survived. Suddenly I had to figure out what to do with my life. I could no longer play tennis like Jim Harkless.

**Arnold Zack:** I know you come from a working-class environment. I've always considered you to be one of the greatest testaments to the GI Bill. Tell us about your roots.

**George Nicolau:** My parents were immigrants from Greece. My father did every immigrant job you can think of: working on railroads, steel mills, running a shoeshine stand. He finally ended up in the restaurant business. I was the only member of the family who ever left the restaurant business and the only one who ever went to college. I am a product of military socialism, which I think was the most important thing that Congress ever did for the veterans of that war. They have never replicated that. Without the GI Bill I never would have gone to the University of Michigan, never would have gone to Columbia Law School, never would have started on my career.

When I was coming to New York, I decided that I wanted to be in labor law and I spent some time in the summer and thereafter

representing unions. My father knew that I had been in some dangerous situations, such as representing an honest teamster who was murdered, and he asked me why I was going into that field when there were so many other things I could do that weren't so dangerous. I blamed him: I told him that he taught me what it was like to work in a nonunion environment and it was his fault.

**Arnold Zack:** Your first work after law school was working at a union firm.

**George Nicolau:** Yes.

**Arnold Zack:** How did you wind up in the Peace Corps?

**George Nicolau:** I worked for two union firms, one of which was a small firm representing the Master, Mates and Pilots union and what was then the Oil, Gas, Coke & Chemical Workers, later the Oil, Chemical & Atomic Energy Workers. Then I went to another firm, run by a marvelous mentor named Herman Cooper, where we represented Actors' Equity, the National Maritime Union, the Newspaper Guild, and others. Then John Kennedy made that great speech at the student union at the University of Michigan before he became President. It got to the point where when you've seen one secondary boycott, you've seen them all.

Bill Haddad, who then worked for the *New York Post* and went to the Peace Corps, told me that I should be there in the Peace Corps. I went to the interview. The people who interviewed me asked me why I wanted to work with them and questioned my inability to speak any foreign language, including Greek. But they passed me up the line until I finally met Sargent Shriver. I went to Shriver's house in what was then Rockville and met him. Obviously, he had been briefed by everyone, so he knew what I had done and who I was. He came out of Chicago and, at that point, did not have long experience in foreign affairs. We sat down and we began to chat. He asked me how I lost my leg. I told him that it was anti-aircraft fire and he insisted that I tell him how it happened. I realized, since Shriver was a very athletic man, that I had to fly this mission for him. At the end he told me that my story was fantastic and he asked me to become the Peace Corps Director in Turkey. I told him that he could not send me to Turkey because I was Greek. He asked me what difference that made and I gave him about a 5-minute lecture on Greek-Turkish history and relations. He then said, "Can I ask you something—how Greek are you?"

I didn't get Turkey, but I got to be a Deputy Director of Special Projects and was responsible for a lot of the congressional reports and troubleshooting in South America, particularly when volun-

teers got into trouble. After their 2-year stint in the field, somebody would go down to debrief the volunteers to ask them how things were and what problems they had. Once I was down in the Dominican Republic doing that and I was trying to describe to the volunteers that we had finally put together a different organization chart where the volunteer was in the middle and everybody else was on the periphery of this circle. One of the volunteers said, "We're right in the middle, right?" "Yeah." "Where the axle is?" "Yeah." That's where the shaft is, isn't it?" So that organizational chart quickly went out the window.

They wanted to send me to Thailand, but they said that my wooden leg would fall apart in that climate. Two years went by and I said I was going back to New York. By that time Sargent Shriver was heading the Office of Economic Opportunity (OEO) and he asked me to go back for him as OEO's Deputy Regional Director. So I did. Then John Lindsay became mayor of the City of New York and asked me to run the anti-poverty program in the city. I did this for 2 years. It was probably one of the most exciting parts of my life because we were helping *people* who never had power to achieve some. It was just terrific to go into those communities and watch them grow.

During this time I had my only quarrel with my old friend Pat Moynihan, who didn't understand what "maximum feasible participation" was. When he was one of OEO's early advisors, he had an agenda that everyone ought to have a guaranteed income. A marvelous objective, but he lost on that. In my opinion, he decided from then on that he wasn't going to like what we were trying to do in the anti-poverty program. As I see it, his book on this subject reflected that. I told him this when he was alive. He understood, but those are the things that happen among friends.

I resigned from the anti-poverty program in early 1968. If you remember, during that period we were heavily into the Vietnam War. The anti-poverty program became a victim of the President's reluctance to raise taxes. He was trying to do guns and butter at the same time. I remember making a speech about that before I resigned. An example of what was happening to the program was President Johnson's appropriations bill signed on December 23, 1967. Whenever a President signs a bill, it not only tells you the date of signing but the location as well. This one said December 23, 1967, Cam Rahn Bay, South Vietnam. The program was not going to go anywhere, so I decided to go on to different things. I ran a foundation for a while.

**Arnold Zack:** Talk about the foundation and the work you were doing in the community.

**George Nicolau:** The foundation was something else. This was a foundation that Ford set up called the Fund for the City of New York that was trying to do innovative things that couldn't be done by the city bureaucracy because of either the bureaucracy itself or a lack of funds. Then happily Ron Haughton and Ted Kheel had an idea for a conflict resolution organization and they asked me to become a part of it. I figured that I had created enough conflict with the anti-poverty program that I ought to try to settle a few, so I became part of that organization, which was known as the Institute for Mediation and Conflict Resolution. There was one condition—that I be allowed to arbitrate part-time.

**Arnold Zack:** Why did you want to arbitrate? How did that come into your focus? Was it difficult to switch from union advocate to arbitrating?

**George Nicolau:** For 8 or 10 years in New York I presented cases before all those New York giants—Ben Roberts, Abe Stockman, Aaron Horwitz, and Jules Justin—and out-of-town giants such as Robben Fleming and Ron Haughton. I thought that what they did was really interesting, and that if I were lucky, maybe I could do it too. So I decided to try and carve out that niche.

As a labor advocate, my first lead lawyer negotiations were for the Bagel Bakers Union in New York. Because most of the discussion was in Yiddish, I thought this life wasn't going to be easy. My first arbitration case many years later was a dispute over the firing of a person who worked for the Four Continents Book Store, which was then the Soviet Union's outlet in New York City. That case was conducted mostly in Russian, another language I didn't understand. The issue was whether a particular word was a swear word and there were dueling interpreters. It was then that I asked myself if I really wanted to become an arbitrator.

I got over that and began to arbitrate part-time, but during most of my 10 years with the Institute I was either doing mediation work or training people to be mediators. There were no mediation textbooks back then, so Mike Sovern, who was then the Dean of Columbia Law School, and I wrote one and have used it ever since with a lot of videotape and other aids. We managed to train most members of the Community Relations Service of the United States Department of Justice when it was just getting off the ground. I think we also trained every community affairs officer in the New

York City Police Department and every precinct commander. We went into prisons in four or five states setting up inmate grievance procedures. We created equal voice-equal vote inmate/staff committees to hear inmate grievances. If the committee couldn't agree on a resolution of the issue, whether it be beards, hair length, writing privileges, or the like, we recruited arbitrators to come in to hear the case and render advisory opinions.

In doing the training, I never asked why a particular inmate was in prison. I really didn't want to know. Marge Gootnick handled one of those cases and mentioned that an inmate I had trained was a marvelous mediator and then asked me if I knew why he was incarcerated. It so happens I had found that out shortly after I had completed training him in mediation techniques, so I told her. He was in Attica because he had been convicted of assassinating Malcolm X. I don't know what I would have done if I had known that beforehand, but it's a good example of why I never asked and never wanted to know. We did exciting work at the Institute, known then as IMCR, and had a great time doing it. But about 1979 or 1980 I decided to become a full-time arbitrator.

One of the questions you asked that I didn't answer was whether it was difficult for me as a union lawyer to be accepted as an impartial arbitrator. I had a number of years of being sanitized because of some 8 years of government service. That helped. Still it wasn't easy in the late '60s and early '70s. As I took the plunge, many people said that I had been fair and open-minded as an advocate and that they would accept me as an arbitrator. Yet I only got five cases my first year. This is why I tell everyone who ever asks how to become an arbitrator that, first, you have to get a day job; then you try to build your practice. You never solicit, but you try to build. It's like the economic curve of a developing country. It goes along one track very slowly and then it will either take off or drop off the chart. It's up to you and your ability. It will grow, but it helps to have some wonderful person supporting you.

By the way, those of you who had read the early program may know that Michel Picher was originally going to be my interviewer. He couldn't come so I asked my long-time friend Arnold Zack to take that role on one condition—that he let me talk once in a while. He agreed, reluctantly, but he agreed. What was the question?

**Arnold Zack:** I was talking about the issue of your coming from a working-class background when a lot of arbitrators come from

management backgrounds. What impact do you think that has on how arbitrators view cases or view the role of arbitration? Does it make a difference what side you come from?

**George Nicolau:** I don't know that I can speak for anyone else. Obviously, coming from the labor side, I tend to look at questions of discipline most of all with an eye toward fairness. I don't know whether persons who come out of the management side do that or not.

**Arnold Zack:** From your perspective?

**George Nicolau:** From my perspective, one thing I don't do in judging fairness is apply the so-called Seven Tests in their entirety. I am referring to Tests 3, 4, and 5, the ones that require a "fair hearing on the property" and an "impartial" company decisionmaker. Some contracts have those specific requirements; airline contracts are a perfect example. When those rules are there, I make sure they are followed and that there are consequences if they are not. But if they are not in the contract, I don't think we have a right to impose them. Nevertheless, my union background conditions me to look first to whether the discipline was fairly done

**Arnold Zack:** A corollary to that—your background as a mediator. How do you think your role as a mediator has influenced your responsibilities as a reader of the contract? Does it make for different inquiry at the hearing? Does it lead you to greater involvement in the hearing? Does it lead you to greater sensitivity to things that may be recited in prehearing discussions?

**George Nicolau:** It may be only the latter. There are some in our profession who think that every case can be mediated. My view is that the parties really thought this through and they're here because they can't resolve it. However, when you're in the hearing, you may see things that they may not have seen and realize that there may be some possibilities here. I might just try to explore those very gently and if I'm rebuffed, I'm rebuffed.

**Arnold Zack:** How do you mediate a grievance in an arbitration? Do you meet the parties jointly? Separately?

**George Nicolau:** I just may ask one or the other if they have talked about that point and if the answer comes back no, then I ask, "Well, why don't you find out if you want to talk about it. If you don't want me, go ahead and talk about it on your own. If you want me, these are the risks." Then I'll either move forward or not.

**Arnold Zack:** Do you offer to serve as the go-between? There are a lot of arbitrators who define mediation as getting people out in the hall and letting them talk with or without the arbitrators sitting

in on that discussion. And then there are other arbitrators who ask to be the go-between.

**George Nicolau:** In the first situation you are being a facilitator—you're just bringing them together. I will not try to be a mediator and carry messages back and forth or talk to one party or the other without their explicit permission. There's a risk; they must understand that they may be telling me something as a mediator that they would not otherwise let me know as an arbitrator. If they don't understand that or they don't buy into it completely up front, I'm not going to mediate.

**Arnold Zack:** What's your batting average? How often do you do it? Is it an effective way of resolving disputes or does it impede your arbitration?

**George Nicolau:** I don't do it very often. When I'm an impartial umpire and know the parties very well, I will probably do it more often. In that situation, I can, in effect, ask them, "What is this case doing here?" Most of the time, in ad hoc situations my first inclination is that they've discussed it fully in the grievance procedure and that there is therefore nothing to mediate. However, there are times nowadays when you discover that the grievance procedure is just pro forma and they haven't talked about it. Then I might step in.

**Arnold Zack:** Does your role as having been a mediator show up in your written decisions? Who do you write your decisions for?

**George Nicolau:** The conventional wisdom is that you write for the parties, but over the course of time I've learned that you also write because there's a court that sometimes doesn't understand what you're doing or what your role is. I try to write, particularly on contentious issues, in a way that bulletproofs that award so that no one can touch it. Many years ago, as David Feller put it, "You, Nicolau, put a drunken pilot back to work."

**Arnold Zack:** You used to be the arbitrator for TWA, Pan Am, United, Frontier, Ozark, National, Flying Tigers—go ahead; you've got great credibility.

**George Nicolau:** Actually, he was a co-pilot. He had been taken off a flight and it was clear that his alcohol level was way beyond acceptable limits. More than a year had passed before his termination had come to arbitration and, by that time, he had been through rehabilitation. I have sustained the discharge of alcoholics, but here I did not because I was provided the strongest evidence of rehabilitation that I had ever heard. So I decided that he ought to be reinstated, but I knew that this would be a very difficult

decision for this airline because it was very strict on this issue. By the way—and I guess others have faced this in system boards—I was told that if my decision went that way, I would not be here anymore. I told them that I understood.

Nevertheless, I decided—since this particular airline did not permit the use of the Federal Aviation Administration’s (FAA’s) reduced standard for recovering alcoholics, which, among other things, allows a person to fly as long as he or she sees a psychiatrist every month—that he could be reinstated only if the FAA decided, after examining him, that he could meet their highest standards. That decision was initially overturned at the district court level on the grounds of public policy because airlines were responsible for the safety of their passengers and arbitrators could not interfere with their judgment.

But the Circuit Court of Appeals for the District of Columbia said, in a decision written by the present chief judge of that court, that here is an award that is giving the authority to reinstate someone to the very agency responsible for the safety of the flying public. It would therefore be the height of “judicial chutzpah” for us to say that such an award violates public policy. You might say, since Chief Judge Harry Edwards, who addressed us a few days ago, had been an arbitrator, “What did you expect?” But he got Judge Robert Bork—you all remember his leanings—and another judge to agree with that decision. So it was unanimous. Today, more than 25 years later, that pilot is retiring at age 60 at the highest level of international flying that airline has. So sometimes you get it right.

**Arnold Zack:** What about the public policy argument? This brings to mind Steve Howe and drug and alcohol issues. You want to tell us about your foibles and problems in that area? Tell the whole story about Steve Howe.

**George Nicolau:** Steve Howe was a pitcher who had been rookie of the year with the Los Angeles Dodgers. It’s misleading to say he had been suspended seven times over the course of his career before Commissioner Fay Vincent banned him for life, because some of those times Howe had pulled himself out of active service after he had gone back to cocaine. When he was originally suspended from baseball, he pleaded with Commissioner Vincent to let him come back and Vincent asked some psychiatrists to look at him. They made a recommendation that he be allowed to return, but that he be tested constantly because this, the psychiatrists said, was the only way to ensure that he would be free from cocaine addiction. A year later, after a successful season with the New York

Yankees, he was arrested near his home in Montana trying to buy some cocaine in what turned out to be a sting operation, and Vincent banned him for life. That was my case.

The dueling psychiatrists, one who represented the major leagues and the other who represented the players, testified. During the course of the proceedings, something seemed to be missing, something about his behavior that wasn't explained, and I asked them if they could agree on impartial doctors to examine Howe on particular questions. One of these questions was whether there was an underlying psychiatric disorder that contributed to his addiction. These two doctors said that they could agree. There had been a hint in the case of Attention Deficit Disorder (ADD). So they picked the most expert ADD man they could find, a professor in Salt Lake City, and a psychiatrist in New York City. These two physicians came back with a report that said there was no question that an underlying psychiatric condition, namely ADD, that had never been diagnosed during his years of treatment and unsuccessful rehabilitation, significantly contributed to Howe's addiction. That conclusion, coupled with the fact that the Commissioner had never put into place the testing program that his own psychiatrist had recommended the year before, led me to the conclusion that the ban shouldn't stand.

I got hell for that decision. Some of the press ripped me apart. Of course, the press never read the decision and had no idea of its basis. I never told them. I guess I could, but I never talk to the press. That's my recommendation to anyone. What I say is this: "I rendered the award. Ask the parties for it if you want to read it and they'll tell you what it says." That New York reporter who ripped me apart, by the way, was sent the decision by one of the parties and he told that party later on that he had made a mistake but he couldn't say anything about that publicly. The fact is, Howe went back and had 2 great years with the Yankees before retiring.

The great thing about that case was the overwhelming number of players who came voluntarily to testify about Howe's great leadership. Not just players, but Buck Showalter, the manager of the club, came even though he was defying the Commissioner when he did so. Jack Long, who had been the Federal Drug Enforcement Administration Director and then worked for Yankees, came and testified on Howe's behalf. The day after Showalter and Long testified, they were called into the Commissioner's office and told that their days in baseball were over. It turned out that their days weren't over. Showalter is now managing a major league

team in Texas. Unfortunately it's in last place, but he's a terrific manager and it won't be in last place forever.

That was a very contentious case. But you have to do what you have to do. What's the line of the song we sang last night, Bobby [Golick]? "If you rule with guts, the parties go nuts." [Laughter] I was proud of that case. Not only did I think the decision was right, but Howe's wife told me that it probably saved his life.

**Arnold Zack:** Let's go back to umpireships and continuity in relationships. Taking that example, the public perception may be quite different from reality. Saul Wallen used to say that if people didn't lose umpireships, you'd never get one. The question is, when you get dumped from a relationship, whether it's an umpire-ship or not, do you have to feel guilty or is it the parties, the politics, and the cases that put you through this revolving door? How much of it is you, how much is it the politics of the parties, and how much is it public relations?

**George Nicolau:** When Tom Roberts was fired from baseball, I was chosen as the next Chairman. Tom was in the middle of hearing the "Collusion One" case when he was fired by the owners for ruling in another case that the clubs could not unilaterally impose drug testing on players. The Association said that he couldn't be fired in the middle of the case; he had to finish "Collusion One" and if the owners didn't allow that, the players were going to sue. The owners finally agreed that an arbitrator could decide whether Tom could stay to finish that case. Thinking about an appropriate arbitrator, they decided to pick the guy that the players had fired for a decision a year or two before. That was Rich Bloch, and he ruled that Tom could come back and hear that case. Then Tom came down with Collusion One during the pendency of my case, which spanned some 49 days of hearings.

In a way, Tom's decision, which was masterful, was somewhat easier than mine because nobody ever made a bid for any free agent player during his collusion year. In my collusion year, there were a couple of what owners said were bids to players: Morris of the Tigers and Ward of the Texas Rangers. Those bids came up in Collusion Two and, after finding a number of smoking guns, it was obvious to me that those bids were shams. So I decided that the collusion continued and that the owners were still trying to curb and ultimately destroy free agency. I knew the minute I signed that award that I would be gone, but I lasted 8 more years and I'm now known as the Cal Ripken of that industry.

**Arnold Zack:** Why did you risk it? Why didn't you just decide it the other way?

**George Nicolau:** Arnold, it was the right decision. And it was clear from the fact that I stayed that the side that lost knew that it was the right decision. Why did I leave baseball in 1995, some 8 years later? In 1995, I had not made a decision in a year. There had been another work stoppage, a long strike that began in 1994 when the World Series was canceled and extended into 1995. When it finally was over, the league's representative called and said that it wasn't any decision or anything like that. I hadn't rendered any in a year. As he put it, they wanted a new face. It happens.

Something else happens if you're in a relationship for a long time. When Ben Roberts died, I took over nationwide National Association of Broadcast Employees and Technicians (NABET)/ABC, NBC contracts—New York, Los Angeles, and Chicago. I was there for years. What happens when you're there for a long time is that the union president gets defeated, the company attorney moves on, new faces come in, and pretty soon they realize that you really know more about what's going on than they do and they think they really can't put anything over on you and suddenly you're gone. It's not a particular decision you've written. They just decide that they would like to have someone else in that seat.

**Arnold Zack:** Who doesn't know where the skeletons are either.

**George Nicolau:** Right. I don't think I've ever been terminated for any particular decision I've ever written, although that may be the case in hockey. I'm not sure. Usually what happens is that you outlive everyone else and the new folks would like to have someone that they can confront on a more or less equal footing.

**Arnold Zack:** How about umpireships in that respect? Would you sign up for a long-term umpireship? Do you prefer the ad hoc relationship?

**George Nicolau:** I like umpireships. You get to know the parties. You can deal with them more quickly. You can look at some of the cases and ask why this is here. You know counsel; you know they're going to do a good job.

**Arnold Zack:** Going back to your airline case where you talked about looking over your shoulder at the courts. How can we avoid being dragged off to the courts? Any guidelines to the arbitrators to avoid litigation on public policy grounds or any challenges to our decisions?

**George Nicolau:** You have to be very careful about how you deal with public policy issues. There are enough precedents on narcot-

ics and no matter what you do to bulletproof your awards, you aren't necessarily going to be upheld at the district court level. Those folks are deciders; they don't like to be told that their opportunity for review is limited. You've seen these decisions. They will mouth *Misco*.<sup>1</sup> They will mouth everything that there is and then go on to say how irrational your decision is and try to wipe it off the books. You can't usually win that until you get to the circuit court level. The *Garvey*<sup>2</sup> case was the perfect example. The Ninth Circuit not only decided that Tom Roberts was wrong when he ruled against Garvey, they ordered that I, as the next arbitrator, enter an award in Garvey's favor. The Supreme Court, as you know, reversed the Ninth Circuit and reinstated Tom's award. When that went up to the Court, Dave Feller wrote a brief on the Academy's behalf saying that the Ninth Circuit was so far off base in deciding the merits of that case that the Court could easily reverse without an oral hearing or an opinion, but that it shouldn't do that. Instead, it should write an opinion reminding the lower courts once again that they had no business substituting their judgment for that of arbitrators chosen by the parties. The Court did just that, reinforcing in clear and direct terms what had been said since the *Trilogy*.<sup>3</sup> Because they're deciders, lots of courts don't like to listen to that, and the Court has to periodically remind them.

**Arnold Zack:** Let's turn now to the Academy.

**George Nicolau:** Before you do, I think this goes back to the second case I heard in baseball, in late 1986 or early 1987, before we started the hearings on Collusion Two. I was holding a hearing in the offices of Willkie Farr and I got a phone call from Bob Coulson, the American Arbitration Association (AAA) President. As you know, he thought labor and management were important, and he told me that I had been picked as arbitrator of the year and that I was going to get the "wise old owl" award. I really couldn't contain myself. I went back into the room with the representatives of the two sides, Don Fehr and Barry Rona, and I told them about the phone call. Both said almost simultaneously, "Let's see the list of the former recipients; we bet we fired them all." The only persons they hadn't fired were the ones who hadn't served.

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<sup>1</sup>*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).

<sup>2</sup>*Garvey v. Roberts*, 203 F.3d 580, 163 LRRM 2449 (9th Cir. 2000), *rev'd sub nom. Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 167 LRRM 2134 (2001).

<sup>3</sup>*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 34 LA 559, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 34 LA 561, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 34 LA 569, 46 LRRM 2423 (1960).

**Arnold Zack:** About the Academy, there was a great stir in the 1970s when you challenged the Academy structure as to its democratic competence in election of officers.

**George Nicolau:** I think it was in the early 1980s, when a nominating committee would give us a slate and there would be a vote. I remember standing up and asking the then-president, "How does one get nominated other than by the nominating committee?" The president told me that I could nominate someone right then and there and I said, "Well, isn't the vote today?" and "How much time do I have to campaign if I nominate someone?" There was a lot of anger about that, but it got the ball rolling. John Kagel and his committee finally drafted language, and 4 years later the whole procedure of nomination by petition with a period to campaign and use of *The Chronicle* was adopted. The year it finally passed, the nominating committee nominated me as a member of the Board of Governors and Marvin Feldman decided to run against me. That was the only time anybody has ever filed a petition under the Academy's new rules. We now have a limited democracy. I'm proud that we did that. By the way, I won that election.

**Arnold Zack:** Should we have more democracy in the Academy?

**George Nicolau:** It seems to me that the Board of Governors is in almost constant session through e-mails and other means. I'm not sure I would want to be in that process because, as Rich Bloch says, he gets enough e-mails as it is. That process is probably good, however, because issues are aired almost constantly and at least you don't have just a few people dealing with a particular subject. I don't think we're in bad shape regarding democracy. As long as we have the opportunity to nominate others if we don't like the slate, I don't think we need more.

**Arnold Zack:** What about our mission? Is it union-management relations? Employment mediation? Public policy?

**George Nicolau:** I think many of you know that after Arnold and the others were involved in the Due Process Protocol, I thought it was important for the Academy to take a step further. So as President, I put the Picher Committee together, which unanimously came back with the Principles and Guidelines to give us some direction on accepting and handling employment cases, such as what cases we should and shouldn't take and under what conditions. We shouldn't abandon that effort.

Much of the mandatory arbitration that happens out there is neither fair nor good. District courts are beginning to look at those mandatory plans more closely than they had in the past, even

though the Supreme Court has shut its eyes to what some of these programs are like. I think we have to keep the pressure on to create a system of mandatory arbitration that is fair in every possible way, in the selection of arbitrators and the authority they are given, not only to conduct the hearing, but to impose the whole panoply of remedies that a court can impose. We can't abandon that effort because there's much more work to be done.

I also think that we ought to take matters a step further. The labor movement is not growing despite the efforts of John Sweeney and others. So we are going to have a great number of unorganized workers subject to mandatory arbitration plans. We can push unions to get active in such situations.

I had a chance to give a paper in Dublin about worker protection in Ireland and in the United States. When you go to other countries, as the American Bar Association International Labor Law Committee does, you see the protection they give to their workers. Years ago, under the leadership of Ted St. Antoine, a Model Unfair Dismissal Act was put together. Since then, only one state, Montana, has moved in that direction. And in Montana, there are more working cattle than there are working people. While we should be pressing unions to be out there doing a service for unrepresented workers by offering to represent them in mandatory arbitrations, I think that the Academy ought to press for statutory unfair dismissal protection for nonunion workers. In some fashion, we ought to be moving toward a system of fair dismissals for any person who works, whether represented by a union or not. If South Africa can do it, there is no reason why we can't. I know that Alan Greenspan thinks that our flexibility is wonderful because an employer can lay off people, just like that, in a union setting, and fire them, just like that, in nonunion settings. The resiliency to rebound that this gives us has value, but we don't have to have a system like that any more than the Italians should have a system that compels a person never to leave a job. There ought to be some more balanced way to deal with the fair dismissal issue. We haven't done that yet in this society partially because we're so much attuned to individualism. It's time for us to think about what the Academy can do about fair dismissal protection in the employment relationship.

**Arnold Zack:** Let me give you these figures. The AAA covers about 6 million nonrepresented employees. Last year the AAA had

1,064 employment cases go to arbitration under their *Gilmer*<sup>4</sup> kind of relationship and about 300 went to decision. You are talking about a system to provide protection for unrepresented people. Here's a system, flawed or not, covering companies that endorse the Due Process Protocol. Yet nobody is raising their heads above the trenches to challenge unfair dismissals or unfair employer actions in the nonunion sector. I agree that we ought to have a labor court and we ought to have severance pay, but the fact is that we have a very quiet work force in spite of the AFL-CIO's efforts.

**George Nicolau:** That's where unions can help. Matt Finkin and others are pushing them into offering services to individuals even though the union has yet to organize the work site. Most unions haven't picked up on this yet, but it doesn't mean we shouldn't be trying. If a union represents a worker in a mandatory arbitration setting and does a good job, it's an organizing tool.

**Arnold Zack:** Do you do many employment cases, other than the one that you and I did?

**George Nicolau:** No. Arnie and I did an employment case with Nicholas Katzenbach. We had a three-person board with the former Attorney General as the third member. I didn't realize that he, like Arvid Anderson, was a navigator and a prisoner of war, so we had lots to talk about.

**Arnold Zack:** What do you think the Academy's going to look like 5 or 10 years from now when you give your next fireside chat? George is probably the youngest person ever to give a fireside chat and in another 10 years or so he should be eligible to return.

**George Nicolau:** I don't know what the Academy's going to look like. We had a very interesting debate today on the inappropriateness of solicitation, and I think it's very important to us to preserve our values on that subject. We have to step up to the plate as far as those values are concerned. If we see someone doing something that shouldn't be done, it's time for us to blow the whistle. There are plenty of opportunities and I think that we should be much more sensitive now than we have been in the past, even though the line between solicitation and advertising is a little bit fuzzy.

**Arnold Zack:** One last question. I want to give an opportunity for questions from the audience. Why aren't you spending more time in Banteer, your place in Ireland?

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<sup>4</sup>*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

**George Nicolau:** I spend a lot of time in Banteer. FedEx keeps busy, I keep sending files there, I write decisions there, I cook there, I watch the horses run. People ask what a Greek like me is doing with a house in Ireland and my answer is, with a wife named Siobhan, what do you expect? When we finally decided to buy this place, we were not certain that this was where all her forebears came from. But it turns out that they came from that area, and we keep finding people who look like her grandfather on every corner.

**From the Floor:** What was the medical problem that led to Howe's addiction?

**George Nicolau:** ADD, Attention Deficit Disorder. It wasn't treated and was never diagnosed. One person in a rehab facility in Minnesota, St. Mary's, saw a possibility of this, but nobody ever really looked at it. By the way, the evidence was that in order to keep him from a cocaine addiction some of the ballplayers decided he ought to become an alcoholic. The kid was messed up from the beginning.

**From the Floor:** All of us at one time or another have brushed up against famous people. I didn't realize that I had brushed up against a famous person. When I was in college I had a job for 6 months at the Peace Corps in Washington and I used to ride in the elevator occasionally with Sargent Shriver, Bill Moyer, and Jay Rockefeller, and I always wondered who was that other fellow.

**George Nicolau:** I was at the Peace Corps starting in April of '61 and those were very heady times.

**From the Floor:** Why is it that there has never been a female president of the Academy?

**George Nicolau:** There have been female presidents.

**Arnold Zack:** Two over 55 years.

**George Nicolau:** One of whom I offended when I brought up the question of democracy, and Jean McKelvey, author of *Sex and the Single Arbitrator*.

**Arnold Zack:** When she was president, she introduced all of the wives at a head table, recounting their accomplishments, and then introduced their Academy husbands, saying something like "And her lovely husband."

**George Nicolau:** That's where I got the "lovely George" comment from.

**From the Floor:** My son is a medical specialist with the Peace Corps and he took me to his office, and there's a whole line of

pictures out on the wall, including yours. I said that man's a good friend of mine and he said you know everybody.

**George Nicolau:** By the way, one story of the Peace Corps I forgot to tell. At the beginning, it was clear that this organization, for all it was doing, was a white, middle-class, college-grad, college-student organization. There were no working-class volunteers. So Frank Mankiewicz and I got together and said there ought to be some working-class programs here. We talked to Sarge about bringing in auto mechanics to train auto mechanics in other countries and so forth. He told us to go for it. I met with George Meany at the Drake in Chicago when he was head of the AFL-CIO and I asked him to convince Ford and GM and others to give guys 2 years off if they wanted to do this. They went out and did it and we had two projects, one in Guinea and one in Peru. As we were going about this, we had some problems over the Peace Corps test that everyone had to take. I asked Sarge to tell me the mechanic who knew the meaning of "cataclysm." He asked why and I told him that you have got to answer that question in the Peace Corps entrance exam. "What the hell do we have that in for?" he said, and I said, "I don't know, Sarge." So we changed that around a little.

**From the Floor:** What are the most important attributes of an arbitrator?

**George Nicolau:** Self-discipline, self-restraint, self-criticism. As you can see, I was listening to Mittenthal today. Many times after I have written an award, I have looked at it and then said, "I'm going to put this away for a little while and come back to it because I'm not sure about it." In addition to being very careful about an award, you have to be very, very careful in running the hearing and not interrupting. I'm a fairly active arbitrator, but only after the parties have left the witness and I want to know something that has not been fully explored. I don't step on counsel, as I think most parties who have dealt with me know. You really have to go back and absorb what has been said, and, oftentimes, you have to use what Judge Hutchinson called the judicial hunch. You will never know the truth, but you'll know what makes the most sense as to what happened. In terms of contract interpretation, you should know something about the context in which this particular language was agreed to because without that context you might never understand what those words mean. I think patience is something else you should have as an arbitrator. You can't say too much; you can't decide tomorrow's case. You can only decide what's in front of you and do it in the best way you can.

**From the Floor:** Of all the awards you've issued, has there ever been one or more than one where you've issued the award and then the next morning or the next week realized it was flat out wrong?

**George Nicolau:** I don't think so. I really don't. There must be some out there but I just can't recall them now. I remember that early in the baseball experience, a case came along that involved probably the most aggressive major league owner who ever lived, Jerry Reinsdorf of the Chicago White Sox. He had devised a method of signing players to long-term contracts before they were eligible for salary arbitration in their third year of major league service. Though that method was almost draconian, I found that it wasn't a violation of the collective bargaining contract. Later, one of the attorneys for the players told me that I had only made two wrong decisions—my first one and that White Sox decision. After I left the baseball chairmanship, he came back and said that he had reconsidered the White Sox case and told me that my decision was right even though he had lost it. I must have made some wrong decisions in my career, but you will have to talk to the parties about that. There's some sitting around here today who could tell you.

**From the Floor:** What do you like best about our profession?

**George Nicolau:** I do love arbitration but I revel in mediation. Mediation is different. You do not have anything working for you except what someone described as an agile mind and a silver tongue. You're trying to get parties together and when that happens and they walk away, either mutually satisfied or dissatisfied but happy that it's over, you have a tremendous rush. I don't know if you remember Harold Newman, but he was the head of the New York State Public Employment Relations Board. Once he was making a speech about mediation and I was in the back of the room. He said that Nicolau said that successful mediation is better than sex, and I said, "Wait, I didn't say that."

What I love about the arbitration profession is that it gives you a chance to use your mind. You've got dueling parties out there that are giving you terrific arguments as to who is right and who is wrong and the intellectual pursuit trying to find what, in your mind, is the correct answer is very, very stimulating. And it's hard work, as Mittenthal and everybody who has ever written about it knows. When it's right, you just simply know it's right and you walk away from that and say it's gone and you don't have to worry about it anymore.

**From the Floor:** You just told us that you don't talk to the press, but you sent me a great e-mail about how to deal with the press type of situation and one of the pieces of advice you gave me was to make sure they spell your name correctly. If you could expand on that experience and that advice, I would appreciate it.

**George Nicolau:** I don't know if I can expand on it. The press is always looking for a hook; they're looking for a story. They're not looking necessarily for what might be the right story. They're looking for something that will sell newspapers, and I have learned that the best thing to say to them is that I can't tell you when I'm going to render the decision; I will tell you where you can get it if the parties want to give it to you.

**Arnold Zack:** What about your role in dealing with the press as a mediator? The parties are jumping to go talk to the press and you've got to limit them. You cannot let them talk to the press because they're going to try to find things that may be disruptive to a mediation.

**George Nicolau:** In a high-profile mediation, I tell the parties that I'm only here if you agree not to talk to the press until I say so or until I do it. If they won't agree to that, I won't get into it.

**Arnold Zack:** The press are going to go burrowing. How do you placate them?

**George Nicolau:** I tell the press that this is a mediation process, that any outside influences are bound to affect it, and I ask for their indulgence. I tell them that there will be periodic reports but they will be given only by me, and the press usually buys that. They will continue to dig and you'll see stuff, but there's nothing much you can do about that.

By the way—Siobhan knows this story—remember when Dave Winfield and George Steinbrenner had this terrible quarrel about money that was supposed to be paid to the Winfield Foundation? At their request, I was going to hold a hearing on this issue. I walked out of my house and three cameramen were there as well as a whole bunch of reporters who wanted a comment. I said I had no comment. "Where's the hearing going to be?" and I said, "I don't know." And I really didn't know because I was supposed to go to a secret phone booth and find out then where the meeting was. You just don't deal with those folks if you can possibly help it.

**From the Floor:** Arbitrations in Ireland?

**George Nicolau:** No, and I probably couldn't do it because I'm not a citizen of the European Union, although I could be. Because

I am the son of Greek parents who were born there, I could have dual citizenship. I went to the Greek consulate once a few years ago to ask how to go about it and they gave me this long form, but they told me not to send it to Greece hoping for an answer. Instead, they told me to go to my parents' home village. Even though the Turks had ruled it when my folks lived there, the Greek consulate assured me that that the records were there and that I could get them. Then they said, "But that's step one." At that point, I decided not to do it. I have been approached to lecture at Cork University, so I may decide to do that. The Irish have, in effect, an industrial tribunal system, and I have met some of the folks there. They have very little private arbitration, but they have some interest in talking about it in the law school and elsewhere. So I may do some of that.

**Arnold Zack:** Thank you very much, George. We look forward to your being old enough to come back and do it again in another 10 years.